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CLARIFYING INDIAN TREATIES AND EXECUTIVE ORDERS WITH RESPECT TO FISHING RIGHTS

MAY 6 (legislative day, APRIL 21), 1987.—Ordered to be printed

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Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 727]

The Select Committee on Indian Affairs, to which was referred the bill (S. 727) to clarify Indian treaties and executive orders with respect to fishing rights, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

The amendment is an amendment in the nature of a substitute and is as follows:

Strike out all after the enacting clause and insert the following:

SECTION 1. Section 2079 of the Revised Statutes (25 U.S.C. 71) is amended by striking out the period at the end thereof and inserting in lieu thereof the following proviso: ": *Provided*, That such treaties, and any Executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit the imposition, under Federal law or under any law of a State or political subdivision thereof, of any tax on any income derived by an Indian from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress.".

SEC. 2. The provisions of this Act shall apply to any period for which the statute of limitations or any other bar to assessing tax has not expired.

Amend the title so as to read: "An Act to clarify Indian treaties, Executive orders, and Acts of Congress with respect to Indian fishing rights.".

PURPOSE

S. 727 amends Section 2079 of the Revised Statutes (25 U.S.C. 71). The bill clarifies the tax-exempt status of Indian fishing income. S. 727 provides that Indian treaties, Executive orders and Acts of Congress under which fishing rights are secured shall be construed to

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prohibit the imposition of a federal or state tax on income derived by a tribal member from the exercise of those fishing rights.

Background

When Europeans arrived on the North American continent, fishing, hunting, and gathering were vital to Indian life. Many Indians relied heavily, some exclusively on these activities for their food, clothing, and economic well-being. As the United States Supreme Court said in *United States* v. *Winans:*

> The right to resort to the fishing places . . . was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.

198 U.S. 371 at 381 (1905).

Consistent with the importance of their traditional practices, the Indians often sought to retain fishing, hunting and gathering rights when they signed treaties with the United States Government.

In the decade of the 1850's Washington territorial Governor Isaac I. Stevens negotiated six treaties with Indian tribes in the Pacific Northwest. In these treaties the signatory tribes reserved for their members "the right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the territory. . . ." The Federal Courts have construed the treaties "not as a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." See *Winans,* 198 U.S. at 381; *United States* v. *Washington,* 520 F. 2d 676, 684 (9th Cir. 1975. The treaties secured for the tribes an opportunity to catch up to 50 percent of the harvestable numbers of fish passing through their traditional fishing areas. *United States* v. *Washington,* 384 F. Supp. 312 at 343, 402, 416–17 (D. Wash. 1974) aff'd, 520 F. 2d 676 (9th Cir. 1975) cert. denied, 423 U.S. 1086 (1976); See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658 (1979).

Treaty rights to fish also exist in other areas of the United States. Oregon tribes signed treaties similar to those signed by tribes in Washington State. Federal courts have found these treaties to guarantee off-reservation fishing rights. See e.g., *Sohappy* v. *Smith,* 529 F. 2d 570 (9th Cir. 1976); *United States* v. *Oregon,* 718 F. 2d 299 (9th Cir. 1976). Indian tribes in the Great Lakes area also reserved off-reservation hunting and fishing rights when they signed treaties with the United States Government. See e.g., *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968); *Lac Courte Oreilles* v. *Voigt,* 700 F. 2d 341 (7th Cir. 1983); *United States* v. *Michigan,* 471 F. Supp. 192 (D. Mich.) *aff'd,* 653 F. 2d 277 (6th Cir. 1981).

In 1871 Congress prohibited further treaty making with Indian tribes. Since then, the usual method of dealing with Indian tribes and establishing reservations has been either by statute, Executive order, or agreement later approved by Act of Congress. Federal courts have found that hunting and fishing rights exist under such

laws by applying the same liberal rules of construction to the construction of executive orders, Acts of Congress, and agreements that have been found to apply to treaties. For example, in *Antoine* v. *Washington,* 420 U.S. 194 (1975), the Supreme Court affirmed the off-reservation hunting rights of a member of the Colville Tribes based on an agreement ratified by Congress in 1891. In *Mattz* v. *Arnett,* 412 U.S. 481 (1973), the Court affirmed the fishing rights of a member of the Yurok Tribe based on an Executive order signed by President Franklin Pierce in 1855. Similarly, in *Metlakatla Indian Community* v. *Egan,* 369 U.S. 45 (1962) and *Alaska Pacific Fisheries* v. *United States,* 248 U.S. 78 (1918), the Supreme Court affirmed the statutory rights of Alaska natives to fish and to gather shellfish off-reservation.

Fishing rights secured by various treaties, Acts of Congress, and Executive orders often included not only the right to fish for subsistence purposes but also the right to fish for commercial purposes. At the time the agreements were made, fish constituted a major part of the Indian diet. Many Indian tribes also used fish for commercial purposes and indeed traded fish in substantial volume. Leaders of Indian tribes are generally thought to have understood that they would be able to continue fishing and trading without, in any way, having to turn over to the Federal Government a portion of their catch.

In *Washington* v. *Fishing Vessel Ass'n,* the United States Supreme Court, quoting from the District court's opinion, described the Indians' reliance on fish for commercial purposes:

> At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this intra-tribal trade was substantial, but it is not possible to compare it with the volume of present-day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. In addition to potlatching, which is a system of exchange between communities in a social context often typified by competitive gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and for export, as well as to provide money for purchase of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area. Those involved in negotiating the treaties recognized the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians' fish for them, plus clams and oysters.

443 U.S. at 665–666 n. 7.

The Court went on to find that, "During the [treaty] negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and [Governor Stevens'] promises that

the treaties would protect that source of food and commerce was crucial in obtaining the Indians' assent." 443 U.S. at 676. The Supreme Court's conclusion that the treaty reserved to the Indians a right to take up to 50 percent of the available fish incorporates the Court's recognition of the role of fish in the Indians' economy and its recognition that the treaty negotiators understood that role and intended that the right to fish commercially was to be included in the rights reserved to the Indians.

Indian treaties, Acts of Congress, and Executive orders which secure tribal fishing rights have been construed for the most part to allow Indian fishermen to continue to fish unencumbered by regulation, licensing, and taxation. In *Tulee* v. *Washington*, 315 U.S. 681 (1942), the United States Supreme Court held that the State of Washington could not require an Indian exercising his off-reservation fishing rights to purchase a state fishing license. Furthermore, state courts have deemed activities of Indians fishing under treaties with the United States to be immune from the imposition of a tax by the state. See *Washington Dept. of Fisheries* v. *DeWatto Fish Co.*, 660 P. 2d 298 (Wash. 1983); *Sea-Pac Co., Inc.* v. *Washington Dept. of Fisheries*, 638 P. 2d 92 (Wash. App. 1982).

In *Puyallup Tribe* v. *Washington Dept. of Fisheries*, 391 U.S. 392 (1968), the Supreme Court held that treaty fishing activities are subject to state regulation where necessary for conservation. In a later case, however, Federal district court judge Boldt ruled that the state has the burden of proving that the regulation is reasonable, and that it is necessary for conservation. To do so, the state must show that the conservation purpose cannot first be satisfied by a restriction of non-Indian fishing. See *United States* v. *Washington*, 384 F. Supp. at 342.

None of the cases construing the scope of Indian fishing rights discuss whether the income derived from the exercise of those rights is subject to federal income taxation. The Supreme Court has held that, in their "ordinary affairs," Indians are subject to the federal income tax to the same extent as other persons. See e.g., *Squire* v. *Capoeman*, 351 U.S. 1 (1956); *Superintendent of Five Civilized Tribes* v. *Comm'r*, 295 U.S. 418 (1935). The Court has ruled, however, that an exemption of Indians from the payment of federal income taxes may be derived from treaties or agreements with the Indian tribes concerned, or some Act of Congress dealing with their affairs. See *Squire* v. *Capoeman*, 351 U.S. at 8–10.

In *Squire* v. *Capoeman*, the Supreme Court reviewed imposition of the federal income tax on capital gains from the sale of timber cut from an Indian trust allotment. The Court held that exemption from the tax on income derived from the allotment was required to fulfill the purposes of the General Allotment Act, under which the allotment had been made. The Court relied on the terms of section 5 of the Act, providing that at the end of the trust period the allotment shall be conveyed to the allottee or his or her heirs in fee, discharged of said trust and "free of all charge or incumbrance whatsoever." The Court also relied on the 1906 amendment to section 6 of the Act, which expressly removes "all restrictions as to . . . taxation" of an allotment after the allottee receives a fee patent. This was viewed as implying a congressional purpose not to tax during the trust period. The government's argument that sec-

tion 6 related only to state taxes was rejected. See *Squire* v. *Capoeman*, 351 U.S. at 7-10.

The Internal Revenue Service has given a restricted reading to the *Capoeman* decision, limiting its application to situations in which income is derived "directly" from land which is held by the United States in trust for the particular individual Indian or is held by that person subject to a restriction on alienation. The Internal Revenue Service has interpreted this type of income to include rentals (including crop rentals), royalties, proceeds from the sale of the natural resources of the land, income from the sale of crops grown upon the land, and from the use of the land for grazing purposes, and income from the sale or exchange of cattle or other livestock raised on the land.

In 1982, the Internal Revenue Service successfully prosecuted a Puyallup Indian employed on a non-Indian fishing boat. See *Earl* v. *Commissioner*, 78 T.C. 1014 (1982). Soon thereafter the Internal Revenue Service began general enforcement efforts against several tribal fishermen. In particular, the Internal Revenue Service has pursued collection efforts against members of the Lummi, Tulalip, Puyallup and Swinomish tribes in the State of Washington.

After learning of attempts to collect income taxes from Indian fishermen, the Assistant Secretary of the Interior for Indian Affairs promptly requested a legal opinion from the Interior Department Solicitor on the propriety of this effort by the Internal Revenue Service. On September 21, 1983, Solicitor William H. Coldiron transmitted to the Assistant Secretary his opinion. Solicitor Coldiron concluded that "fishermen who are members of tribes that have established treaty rights are exempt from Federal income tax on fishing income earned pursuant to those treaties." The opinion of Solicitor Coldiron on the taxability of treaty fishing income is printed at the conclusion of this portion of the Committee's report on S. 727.

On November 23, 1985, the Chief Counsel of the Internal Revenue Service issued an opinion disagreeing with the Interior Department Solicitor. According to the Internal Revenue Service Chief Counsel, a tax exemption would not be established unless the language of the treaty or statute "clearly expressed" such a purpose. An exchange of correspondence followed between the Department of the Interior and the Department of Treasury in an unsuccessful attempt to resolve the differences between the two departments. On March 22, 1985, Secretary of the Interior Donald P. Hodel wrote to Attorney General Edwin Meese advising the Attorney General of the interdepartmental dispute and asking for the Department of Justice to resolve it. Secretary Hodel urged the Attorney General to accept the Interior Department position, arguing that

> Diminution of the treaty fishing rights through the imposition of a tax not only represents an attack on the unique relationship existing between the United States and the Stevens treaty tribes, but marks an abrupt departure from President Reagan's January 24, 1983, Indian Policy Statement which reaffirms the Federal Government's commitment to that relationship and to the trust

> responsibility involving Indian natural resources, and, which further, encourages the development of strong reservation economies.

Nevertheless, on December 12, 1985, the Department of Justice Office of Legal Counsel issued an opinion adopting the view of the Internal Revenue Service. The effect of this decision was to establish the Internal Revenue Service position as the official position of the United States Government and to deny to the courts and to the individual Indian defendants in any subsequent litigation any formal presentation of the views of the Department of the Interior on the issue. A copy of the Justice Department memorandum, and a copy of Interior Solicitor Frank K. Richardson's response to the Internal Revenue Service position, are also printed at the conclusion of this portion of the Committee's report.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, DC, September 21, 1983.

To: Assistant Secretary—Indian Affairs.
From: Solicitor William H. Coldiron.
Subject: Federal income taxation of Stevens treaty fishing income.

You have asked my opinion as to whether the income of members of certain Washington State treaty tribes generated from commercial fishing pursuant to the treaties is subject to the federal income tax. It is my opinion that fishermen who are members of tribes that have established treaty rights [1] are exempt from federal income tax on fishing income earned pursuant to those treaties. This opinion does not apply to income earned by these same fishermen from other sources, such as fishing in nontreaty areas or to income derived from fish in excess of 50% of the available take. This opinion applies only to the federal income tax and does not apply to any other federal tax, excise, fee or license of any kind whatsoever. This opinion does not apply to State taxation in any form.

Your request for my opinion was, I understand, prompted by recent enforcement efforts of the Internal Revenue Service directed toward members of the Lummi, Tulalip, Puyallup and Swinomish Tribes [2] and seeking to collect taxes on treaty * * *

> The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; . . .

Article 4, Treaty of Point No Point, 12 Stat. 933.

This reservation of a right to fish has been interpreted seven times by the United States Supreme Court. *United States* v.

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[1] *United States* v. *Washington*, 384 F.Supp. 312 (W.D. Wash. 1974), *aff'd* 520 F.2d 676 (9th Cir. 1975) *cert. denied*, 423 U.S. 1086 (1976); *United States* v. *Washington*, 459 F.Supp. 1020 (W.D. Wash. 1978); *Puget Sound Gillnetters Ass'n* v. *U.S. District Court*, 573 F.2d 1123 (9th Cir. 1978); *Washington* v. *Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979).

[2] In addition to these tribes, other tribes with treaty rights in Washington include the Hoh, Makah, Huckleshoot, Nisqually, Quileute, Quinault, Sauk-Suiattle, Skokomish, Squaxin Island, Stillaguamish, Upper Skagit, Nooksack, Suquamish, Port Gamble Bank of Clallam Indians, Lower Elwha Tribal Community, Jamestown Band of Clallam Indians and the Yakima Indian Nation. A number of Oregon and Idaho Indian tribes have similar treaty fishing rights.

Winans, 198 U.S. 371 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Puyallup Tribe* v. *Department of Game (Puyallup I)*, 391 U.S. 392 (1968); *Department of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Tribe* v. *Department of Game (Puyallup III)*, 433 U.S. 165 (1977); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel)*, 443 U.S. 658 (1979). These decisions establish the treaty right of the Indians to fish at their usual and accustomed places free of state regulation except where necessary for purposes of conservation and their right to take up to 50% of the available fish.

The fishing rights reserved by the Indians in the treaties included not only the right to fish for subsistence purposes but the right to fish for commercial purposes. At the time of the treaties, the Indians fished commercially, as recognized by the Supreme Court: "Fish constituted a major part of the Indian diet, was used for commercial purposes and indeed was traded in substantial volume." *Fishing Vessel*, *supra*, 443 U.S. at 665. Quoting from the district court's opinion, the Court described the Indians' reliance on fish for commercial purposes in more detail:

> At the time of the treaties, trade was carried on among the Indian groups throughout a wide geographic area. Fish was a basic element of the trade. There is some evidence that the volume of this intra-tribal trade was substantial, but it is not possible to compare it with the volume of present-day commercial trading in salmon. Such trading was, however, important to the Indians at the time of the treaties. In addition to potlatching, which is a system of exchange between communities in a social context often typified by competitive gifting, there was a considerable amount of outright sale and trade beyond the local community and sometimes over great distances. In the decade immediately preceding the treaties, Indian fishing increased in order to accommodate increased demand for local non-Indian consumption and for export, as well as to provide money for purchase of introduced commodities and to obtain substitute non-Indian goods for native products which were no longer available because of the non-Indian movement into the area. Those involved in negotiating the treaties recognized the contribution that Indian fishermen made to the territorial economy because Indians caught most of the non-Indians' fish for them, plus clams and oysters.

443 U.S. at 665–666, n.7.

The Court went on to find that, "During the [treaty] negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and [Governor Stevens'] promises that the treaties would protect that source of food and commerce was crucial in obtaining the Indians' assent." 443 U.S. at 676. The Supreme Court's conclusion that the treaty reserved to the Indians a right to take up to 50 percent of the available fish incorporates the Court's recognition of the role of fish in the Indians' economy and its recognition that the treaty negotiators understood that role and

intended that the right to fish commercially was to be included in the rights reserved to the Indians.

Other Supreme Court decisions have held that the State of Washington could not require an Indian exercising off-reservation fishing rights to purchase a state fishing license, *Tulee* v. *Washington*, supra, and that the state's regulatory authority over treaty fishing was limited to that regulation reasonable and necessary for conservation. *Tulee, Puyallup I, Puyallup II.*

The United States, a direct party to the treaties, is of course bound by them and, absent exercise by Congress of its power to abrogate treaties, is subject to limitations similar to those imposed on the state with regard to the Indians' treaty rights. *United States* v. *Winans*, supra, 198 U.S. at 381–382; *Hoh Indian Tribe* v. *Baldridge*, 522 F. Supp. 683 (W.D. Wash. 1981).

THE TAX CASES

In *Squire* v. *Capoeman*, 351 U.S. 1 (1956), the leading case on federal taxation of Indian income, the Supreme Court considered whether capital gains from the sale of standing timber on allotted lands was subject to the federal income tax. The Court held that the General Allotment Act of 1887, 24 Stat. 388, created an exemption from the tax in the circumstances before it. In reaching its conclusion, the Court acknowledged that the General Allotment Act did not contain an express exemption from the tax but nonetheless inferred an exemption from the government's undertaking, expressed in section 5 of the act, 25 U.S.C. § 348, to convey the allotment at the end of the trust period "free of all charge or incumbrance whatsoever" and a 1906 amendment to section 6 of the act, 25 U.S.C. § 349, which provides for removal of "all restrictions as to . . . taxation" after issuance of a fee patent. 351 U.S. at 6–8. The Court also found that the tax exemption was necessary to fulfill the purpose of the allotment system "to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic.' " 351 U.S. at 9.

The Court responded thus to the government's argument that the case should be treated as an ordinary tax case:

> We agree with the Government that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.

351 U.S. at 6.

While the Court acknowledged that a tax exemption must be clearly expressed; it found the necessary clear expression in language which, as noted above, implied, rather than expressly stated, the exemption. 351 U.S. at 6–8. It did so by reference to the intent of Congress in the General Allotment Act, 351 U.S. at 7–8, and to the principle of treaty and statutory construction which the Court described thus:

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense." [Citations omitted]

351 U.S. at 6–7. [4]

The Court in *Capoeman* held that the taxes from which the General Allotment Act was intended to shield allotments during the trust period included in the federal income tax, even though that tax was not in existence at the time the General Allotment Act and its 1906 amendment were enacted. 351 U.S. at 7–8. The Court also rejected the argument put forth by the government that taxation of income derived from an allotment was sufficiently distinct from direct taxation of the allotment to make income taxation permissible even if direct taxation were prohibited. See 351 U.S. at 6.

Lower court decisions following *Capoeman* have established that the tax exemption in the General Allotment Act applies as well to allotments made under other allotment acts even though those acts do not necessarily contain the exemptive language of the General Allotment Act. *Big Eagle* v. *United States*, 300 F.2d 765 (Ct.Cl. 1962); *United States* v. *Hallam*, 304 F.2d 620 (10th Cir. 1962); *Stevens* v. *Comm'r*, 452 F.2d 741 (9th Cir. 1971). The courts reasoned that the other allotment acts had the same purpose as the General Allotment Act [5] and therefore the same tax exemption should apply. These decisions recognize the essential *Capoeman* holding as founded upon the purpose of the General Allotment Act rather than upon the presence of specific language.

Other lower court decisions which have addressed the extent of the General Allotment Act exemption have held that income earned by an Indian from land purchased and placed in trust for him under § 5 of the Indian Reorganization Act, 25 U.S.C. § 465, shares the tax exemption, *Stevens* v. *Comm'r*, *supra*, but that income earned by an Indian from tribal or other Indians' trust

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[4] This same rule was called upon by the Supreme Court in *Fishing Vessel* when it discussed the necessity of interpreting the Stevens treaties in accord with the intent of the parties:

> [I]t is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." This rule, in fact, has thrice been explicitly relied on by the Court in broadly interpreting these very treaties in the Indians' favor. [citations omitted]

443 U.S. at 675–676.

[5] The Court of Claims stated in *Big Eagle*, "Parallel congressional purposes [between the General Allotment Act and the Osage Allotment Act] are apparent, but the basic purpose is the one alluded to in *Capoeman* and that is to protect the property so that it will adequately serve the needs of the ward and finally bring him to a state of competency and independence. This chance is encouraged, if not guaranteed, by tax exemption." 300 F.2d at 771–772.

land does not. *Holt* v. *Comm'r,* 364 F.2d 38 (8th Cir. 1966), *cert. denied,* 386 U.S. 931; *Fry* v. *Comm'r,* 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011; *United States* v. *Anderson,* 625 F.2d 910 (9th Cir. 1980), cert. denied, 450 U.S. 920. The courts in these latter cases viewed the purpose of the General Allotment Act as one to protect the allottees' property from encumbrance during the trust period, a purpose which would not be infringed by taxation of an Indian's income from other than his own trust property. Thus, while holding the income at issue taxable, these decisions recognized the relevance of the underlying purpose of a treaty or statute to the determination whether language contained therein expresses a tax exemption applicable to the particular circumstances at issue.

The courts in *Holt, Fry,* and *Anderson,* having found the General Allotment Act exemption inappropriate, were also unable to find any exemption in other statutes or treaties relevant to the income at issue. These decisions, as well as others,[6] demonstrates that a tax exemption must derive from language in a treaty or statute and that an exemption may not be based on policy alone or on generalized references to treaties and statutes. E.g., *Anderson,* supra; *LaFontaine* v. *Comm'r,* 553 F.2d 382 (8th Cir. 1976). While holding the particular income at issue taxable, these courts have followed the basic teachings of *Capoeman.* As the Court of Appeals for the Ninth Circuit stated in *Anderson,* that court's most recent opportunity to consider the issue,

> The rule that ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions, . . . but this rule "comes into play only if such statute or treaty contains language which can reasonably be construed to confer income [tax] exemptions" . . . "The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject-matter." (citations omitted.)

625 F.2d at 913.

Further, in response to Anderson's argument that the policy of the General Allotment Act was applicable to his income earned from land other than his own (to which the court found the GAA exemption did not extend), the court stated,

> *Capoeman* and every other Supreme Court and Ninth Circuit case have held that such policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption. Such policy arguments, however, might persuade courts to construe such arguable language, if any exists, actually to be an express tax exemption.

625 F.2d at 914, n. 6.

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[6] E.g., *Comm'r* v. *Walker,* 326 F.2d 261 (9th Cir. 1964) and *Jourdain* v. *Comm'r,* 617 F.2d 507 (8th Cir. 1980) cert. denied 449 U.S. 839, holding the salaries of tribal officials taxable.

Capoeman and its progeny make clear that a tax exemption must be based on treaty or statutory language, arguably creating an exemption, which is applicable to the income-producing activity at issue. Once such arguable language is identified, however, the policy or purpose of the treaty or statute may be called upon to determine whether the language does in fact create an exemption.

The language in the Stevens treaties expressly securing to the Indians the right of "talking fish at usual and accustomed grounds and stations" is such arguable language. First, it is directly applicable to the fishing activity at issue. Thus the instant situation is easily distinguishable from the taxpayers' unsuccessful attempts in *Holt, Fry,* and *Anderson* to apply the General Allotment Act tax exemption to income from land to which the General Allotment Act itself did not apply, and from attempts to infer tax exemptions from other statutory or treaty language which had no direct relation to the activity at issue. *E.g., Anderson, Jourdain* v. *Comm'r; LaFontaine* v. *Comm'r.*[7]

Second, the treaty provision states no limitation on the Indians' rights to fish at usual and accustomed places other than that the right is to be exercised in common with citizens. On its face, the provision might well be read to prohibit any limitation on or diminishment of the fishing right other than the one specified. Of course, it might also be read otherwise but, at the least, an ambiguity exists, sufficient to call into play the rules of construction relating to ambiguous treaty and statutory provisons. Moreover, such an ambiguity makes the language arguably a tax exemption and so requires that the purpose and policy of the treaty be examined to determine whether a tax exemption does exist.

As discussed above at pages 3–4, the right to fish under the Stevens treaties includes the right to fish commercially and thus necessarily the right to earn income from fishing. Commercial fishing under the Stevens treaties, unlike many other economic activities in which Indians might engage, is thus specifically and expressly protected from interference by the United States.

As to the understanding of the Indian treaty negotiators which, as discussed above, the Supreme Court, has considered critical to the proper construction of treaties, it is no more likely that the Indians understood that the federal government would tax their fishing right than that they understood that future states would be able to impose a charge upon it. To the contrary, the Indians were assured that they would be able to fish and trade as they had prior to the treaties, see p. 4, supra, when they paid no taxes and were not required, in any other manner, to turn over a portion of their fishing catch or proceeds to the government.

Accordingly, in my view, the rules of treaty and statutory construction relied upon by the Supreme Court in *Fishing Vessel,*

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[7] In *Anderson*, the Ninth Circuit rejected arguments that sections 5, 6, and 16 of the Indian Reorganization Act, 25 U.S.C. §§ 465, 466, 476, conferred income tax exemptions for the income of an Indian derived from other Indians' land. 625 F.2d at 915–916. In *Jourdain*, the Eighth Circuit concluded that a treaty provision protecting Indians from "molestation by the United States" did not preclude income taxation of a tribal official's salary. 617 F.2d at 508–509. In *LaFontaine*, the Eighth Circuit found that the taxpayer, while citing more than thirty treatites, was unable to point to any povision therein exempting his income from taxation. 533 F.2d at 382.

Tulee, and *Capoeman* require the conclusion that the Stevens treaties reserved to the Indians the right to fish free from taxation, including federal income taxation.

The question remains whether the later-enacted Internal Revenue Code abrogated or modified this treaty right, because Congress, unlike the state legislatures, has the power to abrogate treaties with Indians. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903).

In *Capoeman*, the Supreme Court concluded that the Internal Revenue Code did not modify the federal government's undertaking in the General Allotment Act to hold allotments free of taxation in order to fulfill the purpose of the Act.[8]

> Similarly, the Internal Revenue Code, in my view, did not modify the obligation undertaken by the federal government in the Stevens treaties to recognize the fishing rights reserved to the Indians. As the Supreme Court has stated, "While the power to abrogate [treaty] rights exists . . . 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.'" (citing, inter alia, *Squire* v. *Capoeman.*) *Menominee Tribe* v. *United States*, 391 U.S. 404, 412-413 (1968). In *Menominee*, the Court held that a statute terminating the federal relationship with the Menominee Tribe did not abrogate the tribe's treaty hunting and fishing rights even though those rights derived from a treaty provision creating the tribe's reservation and the reservation itself was extinguished pursuant to the termination act. The Court, as it said, "decline[d] to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians." 391 U.S. at 412. The Court reiterated the principle of *Menominee* in *Fishing Vessel*, while holding that a 1930 agreement between the United States and Canada did not implicitly extinguish the Indians' treaty right. "Absent explicit statutory language," the Court stated, "we have been extremely reluctant to find congressional abrogation of treaty rights." 443 U.S. at 690.

One court has found an implied limitation upon Indian treaty hunting and fishing rights in the Eagle Protection Act, 16 U.S.C. §§ 668-668d. *United States* v. *Fryberg*, 622 F.2d 1010 (9th Cir. 1980), cert. denied, 449 U.S. 1004.[9] Although the court acknowledged the lack of express language in the Eagle Protection Act abrogating or modifying the treaty, it relied upon a body of evidence in surrounding circumstances and legislative history which it believed indicated that Congress did intend that the act apply to treaty Indians, and upon the well-established principle that reasonable and nondiscriminatory conservation statutes apply to treaty rights when such application is necessary to achieve the conservation purpose

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[8] "It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking. To tax respondent under these circumstances would . . . be 'at the least a sorry breach of faith with these Indians.'" 351 U.S. at 10.

[9] The Eighth Circuit reached the opposite conclusion in *United States* v *White*, 508 U.S. 453 (8th Cir. 1974), stating that "it was incumbent upon Congress to expressly abrogate or modify the spirit of the relationship between the United States and the Red Lake Chippewa Indians on their native reservation." *Id.*, at 457-458.

of the statutes.[10] The court also noted that the modification of the Indians' hunting rights was relatively insignificant because eagles had never provided the Indians with "any commercial benefit or . . . subsistence value." 622 F.2d at 1014. Rather, the court noted, the only apparent reason to hunt eagles was for religious and ceremonial purposes, and the act contained an exception permitting use of eagle specimens for religious purposes. Id.

The situation with respect to taxation of treaty fishing income is clearly distinguishable from that addressed in *Fryberg*. The treaty modification which would be implicated by application of the federal income tax to income from treaty fishing is significant because it would diminish the value of the right to fish commercially, a right which, as discussed above, was clearly reserved to the Indians by the treaties. In effect, it would represent a taking by the United States of a portion of the right it guaranteed to the Indians. Moreover, unlike the conservation measures addressed in *Fryberg* and the *Puyallup* cases, supra, at 3-4, whose effectiveness depends upon their being applicable to everyone, the federal income tax can achieve its purposes even though it does not tax every source of income. The "necessity" rationale supporting application of conservation laws to treaty rights is therefore lacking in the case of tax laws. Accordingly, under the principles of *Capoeman* and *Menominee*, absent more explicit language than is present in the Internal Revenue Code, Congress should not be deemed to have modified the Stevens treaty fishing rights nor to have limited or undermined the federal government's undertaking in those treaties.

STROM AND EARL ARE INCORRECT

As I mentioned at the outset, the only two court decisions on federal income taxation of treaty fishing income have concluded that such income is subject to tax. *Strom* v. *Commissioner*, 6 T.C. 621 (1946), off'd per curiam, 158 F.2d 520 (9th Cir. 1947); *Earl* v. *Commissioner*, 78 T.C. 1014 (1982).

The *Strom* decision predated both *Squire* v. *Capoeman* and the *United States* v. *Washington* series of cases. The case involved on-reservation fishing by two members of the Quinault Tribe. The Tax Court apparently considered only Article II of the Quinault treaty, 12 Stat. 971, which authorized the setting aside of a reservation (and by implication exclusive fishing rights therein) for the Quinaults, and not the explicit language in Article III reserving off-reservation fishing rights, which is the language that, as discussed above, creates the tax exemption.[11] In any event, the court analyzed the case by reference to two Supreme Court cases holding taxable a competent Indian's share of tribal oil and gas royalty income and an Indian's investment income.[12]

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[10] See cases cited supra at p. 4.

[11] Although the Article III language ostensibly applies only to off-reservation fishing, the Supreme Court held in *Fishing Vessel* that it also applies to on-reservation fishing, to the extent, at least, that the Indians' on-reservation catch counts in their 50% allocation. 443 U.S. at 687.

[12] *Choteau* v. *Burnet*, 283 U.S. 691 (1931); *Superintendent of Five Civilized Tribes* v. *Comm'r*, 295 U.S. 418 (1935). Both cases were distinguished by the Supreme Court in *Capoeman*, 351 U.S. at 9 and n.19. At the time *Strom* was decided, the Supreme Court appeared headed toward a rule that all or essentially all Indian income was taxable, a clear change of direction from the earlier understanding, derived from administrative rulings, that no Indian income from tribal or

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The third case relied upon by the Tax Court in *Strom,* an earlier Tax Court decision affirmed by the Tenth Circuit, held that an Indian's restricted land and income therefrom was subject to the federal estate tax.[13] In light of *Capoeman* and subsequent decisions, this case is not presently followed by the IRS. See Rev. Rul. 69-164, 1969-1 C.B. 220.

Applying these three cases, the Tax Court made several statements in support of its conclusion which, after *Capoeman* and *Fishing Vessel,* are unpersuasive. First, the court stated that there was no express exemption from tax in the treaty. As discussed above at pp. 5-9, we now know from *Capoeman* and its progeny that a tax exemption, although it must derive from specific language in a treaty or statute, need not be expressly couched in terms of nontaxability. Second, the court considered it significant that the fishing income at issue was in the "untrammeled possession" of the petitioners.

Capoeman sets no requirement that income from allotments (as distinguished from the allotments themselves) must be in restricted status in order to be tax exempt. Third, although it conceded that the federal government could not directly tax exercise of the fishing right, the court concluded that the government could tax income from fishing because a tax on income was not a burden on the fishing right. As discussed above at p. 7, the same distinction between a direct tax and a tax on income was argued by the government in *Capoeman* and rejected by the Supreme Court. Moreover, after *Fishing Vessel,* it is clear that the fishing right reserved by the treaties encompassed the right to sell fish, so that an income tax is, in fact, a burden on the fishing right. See supra, at pp. 10-11. Finally, the court appears to have premised its conclusion in part upon an error of fact, in that it apparently believed that the Indians at treaty time had not engaged in substantial commercial fishing. The court stated, for instance, "It is a far cry from the fishing operations of the members of an uncivilized tribe of Indians at the time of the execution of this treaty, and the commercial fishing business now carried on by the petitioners." 6 T.C. at 627. As we now know, however, the treaty Indians did in fact rely heavily upon fish for commercial purposes. See supra at 3-4.

In my view, the law as it has developed since *Strom* and the facts about Indian fishing that have come to light since *Strom* have undermined that decision so completely that it must now be considered unsound precedent.

Earl v. *Comm'r, supra,* is a 1982 Tax Court decision which reached the same conclusion as *Strom*. For a number of reasons, I do not believe it is persuasive authority. First, the opinion reflects the fact that the petitioner, who had no attorney, was unable to present the court with an adequate analysis of the treaties. It could

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allotted lands was taxable. It was not until ten years after *Strom* that the Supreme Court in *Capoeman* limited the scope of the *Choteau* and *Superintendent* holdings and signalled a return of the pendulum to a point between the two extremes. For an historical analysis of the tax cases, *see* Putzi, "Indians and Federal Income taxation," 2 N.Mex. Law Rev. 200 (1972); Fiske and Wilson, "Federal Income Taxation of Indian Income from Restricted Lands," 10 Land and Water Law Rev. 63 (1975).

[13] *Landman* v. *Comm'r,* 42 B.T.A. 958 (1940) aff'd 123 F.2d 787 (10th Cir. 1941) cert. denied 315 U.S. 810.

not be expected, of course, that the Tax Court, which normally does not interpret treaties, would have, on its own, any appreciable familiarity with the long and complex litigation involving the Stevens treaties. Consequently, although the court briefly alluded to the lower court decisions in *United States* v. *Washington,* it failed to even mention *Fishing Vessel* of any of the other Supreme Court decisions interpreting the treaties and also failed to demonstrate an understanding of the principles of those cases.

Further, the Tax Court, as might be expected, relied heavily on *Strom,* which is, in my view, no longer good law. The court also interpreted *Capoeman* as essentially limited to its facts, contrary to the interpretation given that case by the federal courts of appeal. See discussion, *supra*, at pp. 7–9. Evidently, it was this interpretation of *Capoeman* that led the court to conclude that because the petitioner's fishing rights were not individually owned in the sense an allotment is individually owned, there could be no tax exemption. The court cited *Fry, Anderson* and other cases discussed supra at pp. 7–9 as support for that interpretation, based on the holdings in those cases that, in the circumstances at issue, income earned by Indians from tribal land was not exempt. The basis for those decisions, however, as discussed above, was not that income from tribal property is ipso facto taxable, but that the General Allotment Act exemption did not apply and, second, that no other exemption could be found in treaty on statute. The second basis for those decisions makes them inapplicable to treaty fishing income, for which an exemption is found in the treaties. For these reasons, particularly the lack of treaty analysis, I do not consider the *Earl* decision authoritative.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGAL COUNSEL,
Washington, DC, December 12, 1985.

MEMORANDUM FOR DONALD PAUL HODEL, SECRETARY OF THE INTERIOR

Re Taxability of Indian Treaty Fishing Income.

Your letter of March 22, 1985 to the Attorney General regarding the taxability, under federal law, of income earned by certain Indian tribes from the exercise of commercial fishing rights guaranteed by treaty has been submitted to the Office of Legal Counsel for review. This review, which examines the different positions of the Department of the Interior and the Internal Revenue Service (IRS) on this subject, is being undertaken pursuant to Executive Order No. 12146 (July 18, 1979) and 28 C.F.R. 0.25, which authorize the Office of Legal Counsel, on behalf of the Attorney General, to resolve legal disputes between Executive Branch agencies.

In 1983, former Solicitor Coldiron of the Department of the Interior concluded that the treaty language reserving fishing rights to Indian tribes precluded federal taxation of income derived from the

exercise of those rights.[1] The IRS does not share that view,[2] and has attempted to collect income taxes on fishing income earned by tribal fishermen from commercial fishing operations. A number of Indians who have received notices of deficiency from the IRS have filed petitions for redetermination in the Tax Court.[3]

As you note in your letter, the Department of Justice will need to resolve this issue in order to arrive at a uniform position of the United States, should the pending cases proceed to litigation handled by the Department. We have therefore reviewed the dispute in that context. As set forth below, we believe that the position of the IRS represents the more reasonable and sound reading of the applicable Supreme Court precedent, and therefore can be maintained in litigation handled by this Department.

I. BACKGROUND

A. Interpretation of Treaty Fishing Rights

The treaties at issue here were negotiated in the 1850's with Indian tribes living in what is now the State of Washington in order to extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River.[4] See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 661–62 (1979). In exchange for their interest in most of the territory, the Indians were given monetary payments and the "exclusive use" of relatively small tracts of land, as well as certain other rights, including the right to fish. Id. With immaterial variations, the treaties each provide:

> The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands.

Art. III, Treaty of Olympia, 12 Stat. 972.

The scope of the fishing rights secured by these treaties, and the extent to which a state may interfere with those rights, has been considered on a number of occasions by the Supreme Court. See,

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[1] You have provided us with a copy of a memorandum from Solicitor Coldiron to the Assistant Secretary—Indian Affairs, dated Sept. 21, 1983, which concludes that fishermen who are members of tribes that have established treaty fishing rights are exempt from federal income tax on fishing income earned pursuant to those treaties. That conclusion was affirmed in a more recent memorandum from the Solicitor to the Secretary of the Interior, dated March 12, 1985, which you also provided to us.

[2] The Commissioner of the Internal Revenue issued technical memoranda in 1983 adopting the position that members of the affected Indian tribes are subject to the federal income tax. In a letter dated November 23, 1983, the Acting Chief Counsel of the Internal Revenue Service informed Solicitor Coldiron that the IRS saw no reason to change that position, and reviewed the legal basis for that conclusion. The IRS has maintained that position in the ongoing litigation in Tax Court (see infra).

[3] We have received copies of pleadings on summary judgment motions filed in two of those proceedings, *Jefferson* v. *Com'r*, Docket No. 836–84 (United States Tax Court); *Greene* v. *Com'r*, Docket No. 15921–84 (United States Tax Court).

[4] The Sept. 21, 1983 memorandum from Solicitor Coldiron (see n. 1) lists the following treaties as applicable here: Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132; Treaty of Point Elliott, January 22, 1855, 12 Stat. 927; Treaty of Point No Point, January 26, 1855, 12 Stat. 933; Treaty of Neah Bay, January 31, 1855, 12 Stat. 939; Treaty with the Yakimas, June 9, 1955, 12 Stat. 951; Treaty of Olympia, July 1, 1855 and January 25, 1856, 12 Stat. 971.

e.g., *United States* v. *Winans*, 198 U.S. 371 (1905); *Seufert Bros. Co.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *Washington*, 315 U.S. 681 (1942); *Puyallup Trible* v. *Department of Game (Puyallup I)*, 391 U.S. 392 (1968); *Department of Game* v. *Puyallup Tribe (Puyallup II)*, 414 U.S. 44 (1973); *Puyallup Department of Game (Puyallup III)*, 433 U.S. 165 (1977); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979). The Court has recognized that the rights secured by the treaties include the right to fish for commercial, as well as subsistence, purposes, and that the fishing right was critically important to the Indians in their acceptance of the treaties.[5] The Court has specifically rejected the argument that the treaties guarantee to the Indians only the opportunity to compete with nontreaty fishermen on an individual basis, finding instead that the treaties entitle the Indians to take a fair share of the available fish.[6] In reaching that conclusion, the Court has found it significant that the Indians reserved to themselves preexisting fishing rights, rather than obtained rights from the government:

> Because the Indians had always exercised the right to meet their subsistence and commercial needs by taking fish from treaty area waters, they would be unlikely to perceive a "reservation" of that right as merely the chance, shared with millions of other citizens, occasionally to dip their nets into the territorial waters.

Washington v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. at 678–79.

The Court has defined an "equitable measure" of the treaty right to be a division of the harvestable portion of each run that passes through a "usual and accustomed" place into "approximately equal treaty and non-treaty shares." The treaty share should be reduced, however, "if tribal needs may be satisfied by a lesser amount." *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. at 685. Drawing on cases involving Indian reserved water rights,[7] the Court stated that:

> [T]he central principle here must be that Indian treaty rights to a natural resource that once as thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood—that is to say, a moderate living. Accordingly,

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[5] See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Associaton*, 443 U.S. at 665–66 & n.7, 676 ("During the negotiations, the vital importance of the fish to the Indians was repeatedly emphasized by both sides, and the Governor's promises that the treaties would protect that source of food and commerce was crucial in obtaining the Indians' assent.").

[6] See id. at 678 ("But we think greater importance should be given to the Indians' likely understanding of the other words in the treaties and especially the reference to the 'right of taking fish'—a right that had no special meaning at common law but that must have had obvious significance to the tribes relinquishing a portion of their pre-existing rights to the United States in return for this promise. . . . In this context, it makes sense to say that a party has a right to 'take'—rather than merely the 'opportunity' to try to catch—some of the large quantities of fish that will almost certainly be available at a given place at a given time."); *see also id.* at 683; *Puyallup I*, 391 U.S. at 398; *Puyallup III*, 433 U.S. at 48–49.

[7] The Supreme Court has held that treaties reserving land for the use of Indians in the arid western states also reserve, by implication, rights to water sufficient to meet subsistence or other needs of the Indians reasonably within the contemplation of the parties at the time the treaties were negotiated. See *Winters* v. *United States*, 207 U.S. 564, 576 (1908); see generally *Cappaert* v. *United States*, 426 U.S. 128 (1968).

> while the maximum possible allocation to the Indians is fixed at 50%, the mimimum is not; the latter will, upon proper submissions to the District Court, be modified in response to changing circumstances.

Id, at 686–87.

The Court has also made clear that a state cannot interfere with the exercise of the fishing right, other than nondiscriminatory regulations reasonable and necessary for conservation of the fish. Thus, a state may not grant a nontreaty fisherman rights to use a "fish wheel"—a device capable of catching fish by the ton and totally destroying a run of fish, thereby effectively excluding the Indians from the right to take fish at a "usual and accustomed place."[8] A state may not require Indians to obtain a fishing license as a prerequisite to exercise of their treaty rights,[9] and must give Indians access across private lands, if necessary, in order to assure access to treaty fishing locations.[10] State regulations justified on the basis of conservation must be both reasonable and necessary, and cannot discriminate against exercise by the Indians of their fishing rights.[11]

On the other hand, the Indians cannot rely on their treaty right to exclude others from access to certain fishing sites outside the reservation in order to deprive other citizens of the state of a "fair apportionment" of a particular run.[12] In sum,

> [n]ontreaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of . . . fish in th case area. Nor may treaty fishermen rely on their exclusive right of access to the reservations to destroy the rights of other 'citizens of the Territory.' Both sides have a right, secured by treaty to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians, the right of taking fish in common with other citizens.

Washington v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. at 684–85.

The analysis in these treaty fishing cases relies heavily on factual evidence about the understanding of the parties at the time the treaty was negotiated and the importance of the fishing rights to the Indians who signed the treaties. The Court, consistent with its approach in other cases involving construction of Indian treaties, gave "special meaning" to the rules that "it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties," because of the circumstances of the negotiations:

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[8] *United States* v. *Winans*, 198 U.S. 371, 384 (1905).
[9] Seufert Bros. v. *United States*, 249 U.S. 194, 198 (1919).
[10] *Tulee* v. *Washington*, 315 U.S. 668, 685 (1942).
[11] *Puyallup I*, 391 U.S. at 398; *Puyallup II*, 414 U.S. at 44, 45, 48 (total ban on commercial net fishing for steelhead is not a "reasonable and necessary conservation measure").
[12] *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. at 683–84.

> [This Court] has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. '[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'

Washington v. *Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. at 675–76 (citation omitted).

B. Indian Tax Cases

None of the cases construing the scope of the fishing right guaranteed by treaty discuss whether the income derived from exercise of the right to take a fair share of fish at "usual and accustomed places" is exempt from federal income taxation. The Supreme Court and the lower federal courts have, however, reviewed the taxabililty of income earned by Indians in other contexts. The leading case involving the authority of the federal government to tax Indian income is *Squire* v. *Capoeman,* 351 U.S. 1 (1956), in which the Supreme Court considered whether capital gains from the sale of standing timber on lands allotted to noncompetent Indians [13] pursuant to the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 331 *et seq.,* was subject to the federal income tax.

The General Allotment Act was intended to begin a new era in federal Indian policy. By treaty, most Indians had been guaranteed exclusive use of reservation land. Under the General Allotment Act, tribal lands were to be divided and allotted to individual members of the tribe. The allotments were to be held in trust by the United States for twenty-five years or longer, if the President deemed an extension desirable, and then to be transferred to the allottee discharged of government trusteeship. 25 U.S.C. §§ 347, 348.

The Court began its analysis in *Squire* with the principle, already established in prior cases,[14] that Indians are citizens and

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[13] A noncompetent Indian is one who holds allotted lands only under a trust patent, and who may not dispose of his property without the approval of the Secretary of the Interior. It does not denote mental capacity.

[14] In *Choteau* v. *Burnet* 283 U.S. 691 (1931), and *Superintendant of Five Civilized Tribes* v. *Com'r,* 295 U.S 418 (1935), the Supreme Court definitively rejected the argument that Indians are exempt from federal taxation merely because of their status, in the absence of treaty or statutory provisions to the contrary. In *Choteau,* the Court held taxable the petitioner's share of tribal income from oil and gas leases made by the tribe pursuant to statute, concluding that "[t]he intent to exclude [income from taxation] must be definitively expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter." 283 U.S. at 696 (citations omitted). In *Superintendant of Five Civilized Tribes,* the Court concluded that the proceeds from the investment of funds derived from a restricted allotment were subject to federal taxation. See 295 U.S. at 420–21. Both *Choteau* v. *Burnet* and *Superintendant* were distinguished by the Court in *Squire* v. *Capoeman.* The Court noted that *Choteau* concerned the question whether an Indian was exempt from tax solely because of his status, and that the facts in *Choteau* fit within the terms of section 6 of the General Allotment Act, which contemplates taxation of income earned by a competent Indian who has unrestricted control over lands and income thereon. *Superintendant of Five Civilized Tribes* was distinguished on the ground that the income involved was "reinvestment income" or "income derived from investment of surplus income on land." The Court stated that it would not be necessary to exempt such income from taxation in order to fulfill the purposes of the General Allotment Act. See 351 U.S. at 9.

. . . in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens.

351 U.S. at 5-6.

The Court recognized, however, that applicable treaties or statutes could create tax exemptions, if such exempions were "clearly expressed." Id. The Court found such an exemption in the language in section 5 of the General Allotment Act, which provided that lands on Indian reservations allotted to individual Indians and held in trust for them by the government shall ultimately be conveyed to them in fee simple discharged of the trust and "free of all charge or incumbrance whatsoever." 25 U.S.C. § 348.

The Court recognized that this statutory provision was not "expressly couched in terms of nontaxability," and in fact was in effect prior to enactment of any federal income tax, but nonetheless concluded that the words "charge or incumbrance might well be sufficient to include taxation." 351 U.S. at 7. In reaching this conclusion, the Court relied on its earlier statements indicating that ambiguous language of treaties and statutes applicable to Indians should be interpreted favorably to the Indians:

> Doubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith. Hence, in the words of Chief Justice Marshall, 'The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the later sense. *Worcester* v. *The State of Georgia,* 6 Pet. 515, 582.' *Carpenter* v. *Shaw,* 280 U.S. 363, 367.

Id. The Court did not find it necessary, however, to rely solely on the language of section 5. It found "additional force" in section 6 of the General Allotment Act, 25 U.S.C. § 349, which authorized the Secretary of Interior to issue a patent in fee simple to any allottee competent to manage his own affairs. That section provided that "thereafter *all restrictions as to* sale, incumbrance, or *taxation* of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent . . . ." (Emphasis added). The Court concluded that "[t]he literal language of the proviso evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted." Id. at 7-8.

The Court also found that its interpretation of the intent of section 5 was supported by several Attorney General opinions and unofficial writings "relatively contemporaneous" with the enactment of the General Allotment Act. 351 U.S. 8-9. The Court concluded the opinion with the observation that the exemption in section 5

was consistent with the overall purpose of the General Allotment Act:

> Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary change of economic survival in competition with others. This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent.

Id. at 9.

The analysis in *Squire* v. *Capoeman* has been applied in a number of subsequent cases in the federal courts of appeals. In those cases arising under the General Allotment Act or other acts construed by the courts *in pari materia* with the Act, the courts have generally held that income derived directly from the ownership of restricted allotted land is exempt from federal taxation. See, e.g., *United States* v. *Hallam*, 304 F.2d 620 (10th Cir. 1962); *Stevens* v. *Com'r*, 452 F.2d 741 (9th Cir. 1971); *see also Big Eagle* v. *United States*, 300 F.2d 765 (Ct. Cl. 1962). Income that is not derived directly from the taxpayer's individual ownership of the land or that is derived from the ownership or use of unrestricted or unallotted land, however, is subject to taxation. See, e.g., *Holt* v. *Com'r*, 364 F.2d 38 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967) (income from grazing on reservation land); *Fry* v. *Com'r*, 557 F.2d 646 (9th Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (income from logging operation on reservation land); *United States* v. *Anderson*, 625 F.2d 910 (9th Cir.), cert. denied, 450 U.S. 920 (1980) (income from cattle ranching on reservation land); *Com'r* v. *Walker*, 326 F.2d 261 (9th Cir. 1964) (income earned as employee of the Indian Community); *Jourdain* v. *Com'r*, 617 F.2d 507 (8th Cir.), cert. denied, 449 U.S. 839 (1980) (income earned as chairman of tribal council).

These cases interpret *Squire* v. *Capoeman* to teach that a tax exemption must derive from some particular language in a treaty or statute, although that language need not specifically set out a tax exemption, and that an exemption may not be based on policy alone or on generalized references to treaties and statutes. In *United States* v. *Anderson*, the Ninth Circuit Court of Appeals explained the *Squire* analysis as follows:

> The rule that ambiguous statutes and treaties are to be construed in favor of Indians applies to tax exemptions, . . . but this rule "comes into play only if such statutes or treaty contains language which can reasonably be construed to confer income [tax] exemptions" . . . . 'The intent to exclude must be definitely expressed, where, as here, the general language of the Act laying the tax is broad enough to include the subject matter.'

625 F.2d at 913 (citations omitted).

The Court explained further that, although "policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption," policy arguments "might per-

suade courts to construe such arguable language, if any exists, actually to be an express tax exemption." Id. at 914 n.6.

In *Karmun* v. *Com'r*, 749 F.2d 567 (9th Cir. 1984), the Ninth Circuit applied this analysis in a case arising under the Reindeer Industry Act of 1937, 25 U.S.C. § 500. That Act authorizes the Secretary of Interior to acquire for the Alaskan natives reindeer and other property owned by nonnatives. The Secretary is authorized to distribute or hold in trust the reindeer and other property, and to organize, manage, and regulate the reindeer industry in such a manner as to establish and maintain for the Alaskan natives a self-sustaining business. *See* 749 F.2d at 569. The court rejected the claim made by Indians who operated herds of reindeer under that Act that their income should be exempt from federal taxation under the *Squire* v. *Capoeman* rationale. The Court noted that "[i]ncome is tax exempt under *Squire* only when the governing treaty or statute contains language which can reasonably be construed to confer an exemption," 749 F.2d at 570; it found "no clear expression of intent to exempt" in the Reindeer Act. In addition, the court found it significant that the purposes of the general Allotment Act and of the Reindeer Act were different:

> The purpose of the GAA was to benefit the individual allottees by preparing them to become independent citizens. Accordingly, the *Squire* court found that the tax exemption was crucial to fulfilling this purpose. By contrast, the purpose of the Reindeer Act is to provide a continuing food source to the Eskimos of northwestern Alaska through the establishment of a native-operated reindeer industry. That purpose is not undermined by requiring the owners and operators of reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations.

749 F. 2d at 570 (citations omitted).

The issue we have been asked to address—the taxability of treaty fishing rights—has been considered twice by the Tax Court, once before the *Squire* v. *Capoeman* decision and again in 1982. *Strom* v. Com'r, 6 T.C. 621 (1946), aff'd per curiam, 158 F.2d 520 (9th Cir. 1947); *Earl* v. *Com'r* 78 T.C. 1014 (1982). In both *Strom* and *Earl*, the Tax Court concluded that income earned by the Indians from the exercise of treaty fishing rights is subject to the federal income tax. In *Strom*, the Tax Court rejected the argument advanced by the Indians that imposition of a tax upon income earned in carrying on a commercial fishing business is a restriction on the right to fish guaranteed by treaty:

> The Quinaielt Indians on the reservation were as free to fish in the Quinaielt River after the imposition of an income tax as they were prior to that time. The disputed income tax is not a burden upon the right to fish, but upon the income earned throught the exercise of that right.

6 T.C. at 627.

Noting that there was no express exemption from tax in the treaty, and that the income involved was derived "personally" by a restricted Indian (rather than in trust), the Tax Court concluded

that the income was subject to the general tax provisions of the Internal Revenue Code. In *Earl*, the petitioner relied on *Squire* v. *Capoeman* as a basis for his claimed tax exemption, arguing that income from fishing in the usual and accustomed fishing grounds is analogous to income from the cutting of timber from allotted lands.[15] The Tax Court rejected that analogy finding rather than the treaty language guaranteeing the right to fish "contains nothing dealing with the taxation of income derived from such fishing." 78 T.C. at 1017. Moreover, it found that the right of an Indian to share in treaty fishing rights is more comparable to his right as a member of the tribe in unallotted land on the reservation (income than to individual rights allotted land (income from which would fall within the "free from charge or incumbrance" language analyzed in *Squire* v. *Capoeman*). Id.

In contrast to its treatment of cases involving federal taxation, the Supreme Court has repeatedly held that Indians and their property are exempt from state taxation within their reservations, unless Congress clearly manifests its consent to such taxation. See *Montana* v. *Blackfeet Tribe of Indian*, 470 U.S. ——, 53 U.S.L.W. 4625, 4627 (1985); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 170–71 (1973). Those decisions rest on a preemption rationale, as explained by the Court in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976):

> The *McClanahan* principle derives from a general preemption analysis that gives effect to the plenary and exclusive power of the Federal Government to deal with Indian tribes, and "to regulate and protect the Indians and their property against interference even by a state." This pre-emption analysis draws support from "the 'backdrop' of the Indian sovereignty doctrine," " '[t]he policy of leaving Indians free from state jurisdiction and control [which] is deeply rooted in the Nation's history,' " and the extensive federal legislative and administrative regulation of Indian tribes and reservations. "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation," and therefore " 'State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.' "

426 U.S. at 376 n.2 (citations omitted).

Property and income earned outside the reservation, however, have generally been held to be subject to nondiscriminatory state taxation, unless federal law otherwise provides for an exemption. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148–49, 155–56 (1973) (state may impose gross receipts tax on ski resort operated by Indian Tribe on off-reservation land).

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[15] Pleadings filed by some of the Indian tribes in the pending Tax Court proceedings state that the factual premise of the holding in *Earl*—that the income was earned through exercise of treaty fishing rights—is incorrect, because the individual involved, although an Indian, was fishing as a crewmember on a vessel owned by a non-Indian, and merely shared in proceeds attributable to non-Indian treaty shares.

C. Positions of the Department of the Interior and the IRS

The Department of the Interior and the IRS both recognize that the relevant analysis here is that used by the Court in *Squire* v. *Capoeman*. The disagreement centers on whether the treaty languge is sufficiently specific to meet the threshold requirements of *Squire*, and what role policy considerations play in interpreting that language.

1. Department of the Interior position

The Department of the Interior maintains that the treaty languge expressly securing to the Indians the right of "taking fish at usual and accustomed grounds and stations" is language that meets the threshold requirement of *Squire* v. *Capoeman* that a tax exemption be based on specific languge. It is language that is "directly applicable" to the fishing activity, and does not state any limitation on the right other than that the right is to be exercised in common with other citizens. Interior therefore argues that the language, on its face, "might well be read to prohibit any limitation on diminishment of the fishing right other than the one specified." Interior Memorandum (Sept. 21, 1983) at 9.

Interior acknowledges that the language "might also be read otherwise," but argues that, at a minimum, an ambiguity exists and, accordingly, that the treaty must be construed in the light most favorable to the Indians. See generally *Squire* v. *Capoeman*, 351 U.S. at 7. Interior notes that at the time of negotiation of the treaty the reference to the right of "taking fish at usual and accustomed grounds and stations" was clearly intended to include commercial fishing activities, see *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 665–66 & n.7, 676, and that the Indians were assured that they would be able to fish and trade as they had prior to the treaties—that is, without taxation and with no obligation to turn over a portion of their fishing catch or proceeds to the federal government. Thus, Interior reasons that "it is no more likely that the Indians understood that the federal government would tax their fishing right than that they understood that future states would be able to impose a charge upon it." Interior Memorandum (Sept. 21, 1983) at 10.[16]

2. IRS Position

IRS contends that the interpretation advanced by the Department of the Interior would be "an unwarranted expansion of the

[16] This argument is considerably expanded in the pleadings filed by Indian tribes in the Tax Court proceedings. Those tribes have opposed motions for summary judgment filed by the IRS on the ground, inter alia, that "a decision cannot be made without a thorough understanding of the historical and anthropological data surrounding the negotiation of the Treaty," which can be presented only at trial. See, e.g., Brief for Petitioner, *Jefferson* v. *Com'r*, Docket No. 836–84 (Tax Court, Apr. 18, 1985) at 2. A number of affidavits have been offered with those pleadings to provide a foundation for petitioners' claims that at trial they will demonstrate that the Indians negotiating the treaties did not contemplate that the United States would be allowed to tax or otherwise to take a share of the fishery which the Indians reserved for themselves. The tribes also argue that there is no evidence that the United States attempted to negotiate for the right to tax treaty fishing income in the treaty negotiations or understood that the treaty gave it that right, and that there is no suggestion in the numerous Supreme Court and lower federal court decisions construing treaty fishing rights that "one of the federal purposes in negotiating these agreements was to enable [the government] to raise revenue from the Indians' commerce." Id. at 6.

principles announced in *Squire* v. *Capoeman*." IRS Memorandum at 11-12. IRS believes that the treaty language granting the fishing rights cannot reasonably be construed to create a tax exemption. IRS views Interior's position as a policy argument of the type of the courts have rejected as a sole basis for a tax exemption, and views the "non-tax cases" cited by Interior (i.e., those cases construing the treaty fishing rights) as inapposite, because they merely "clarify the rights which the treaties guarantee—rights which we are disputing only to the extent that Interior is reading them to convey a specific tax exemption." IRS Memorandum at 10. Accordingly, IRS maintains that the reasoning of the Tax Court in *Storm* and *Earl* is persuasive, and should be followed by the IRS in its enforcement efforts.

II. ANALYSIS

The dispute between the Department of the Interior and the IRS arises out of an inherent tension between two applicable, longstanding canons of construction: first, that, regardless of the circumstances, exemptions from federal income taxation be "definitely expressed";[17] and second, that treaties and statutes affecting Indians are to be interpreted liberally, in light of the trust responsibility of the United States and bearing in mind the Indians' historically inferior bargaining position, which characterized the negotiation of the treaties.[18] Unfortunately, the courts have not been wholly consistent in describing how the balance between the competing canons should be struck. In *Squire*, the Court noted that the "free from charge or incumbrance" language of section 5 was not "expressly couched in terms of nontaxability," but found that the words used were "susceptible of a more extended meaning than their plain import, as connected with the tenor of their treaty." 351 U.S. at 7. In *Choteau* v. *Burnet*, the Court stated that the intent to exclude must be "definitively expressed." 283 U.S. at 696. The language used in *United States* v. *Anderson* referred both to the need for "express exempting language in a statute or treaty," 625 F.2d at 917, and to statutory or treaty language "that arguably is a tax exemption," id. at 914 n.6. In *Holt* v. *Com'r*, the Court referred to language that "can reasonably be construed to confer income tax exemptions." 364 F.2d at 40.

Nor have the courts articulated precisely what types of underlying considerations would be persuasive in construing specific language as a tax exemption. While the courts have generally rejected arguments that the general goal of increased economic opportunities for Indians justifies an exemption from federal income taxes, they have nevertheless recognized that the federal government's responsibility to the Indians must color interpretation of treaty rights and obligations. Moreover, there are few concrete examples to guide our analysis, because as far as we are aware, the only specific language that has been analyzed by the courts for the purpose of determining whether a federal tax exemption exists is the language in sections 5 and 6 of the General Allotment Act.

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[17] See supra at 7-8 & n.14.
[18] See supra at 6.

Although in the absence of direct guidance from the courts it is difficult to determine definitively whether the treaty language falls within the *Squire* rationale, we believe that the position taken by the IRS represents the sounder view of the law. For this reason, as we discuss below, we believe that if the pending cases proceed to the federal courts, the Department of Justice could argue the position set out by the IRS.

The Department of the Interior has argued that because the treaty contains some language dealing with fishing rights the threshold *Squire* v. *Capoeman* test has meant met. We believe that is an overly broad reading of *Squire* v. *Capoeman*. There is a significant difference between the specific language relied upon by the Court in *Squire* v. *Capoeman* and the language relied upon by the Department of the Interior to support a tax exemption. In *Squire*, and in its preceding decisions in *Choteau* and *Superintendent of Five Civilized Tribes*, the Court emphasized that the language creating a tax exemption must be specific and clear, because the language of the Internal Revenue Code otherwise plainly encompasses income earned by Indians from any source. See supra at 7-8 & n.14. In *Choteau* and *Superintendent of Five Civilized Tribes* the Court did not find such language, even in the face of express treaty guarantees of exclusive use of reservation land (language that the Court did not address). The difference in *Squire* was the presence of specific statutory language that, although not expressly mentioning taxation, expressly dealt with "charges" and "incumbrances" that might be levied on the allotted land. In addition, the Court had the benefit of other literal language in the statute dealing with the grant of the land in fee simple to the Indians, which expressly included taxation as a restriction that otherwise might be applicable to the land. Thus, it was not difficult for the Court to conclude that Congress intended to include taxation (including taxation of income derived directly from the land) as a "charge or incumbrance" within the meaning of section 5 of the General Allotment Act.

Here the treaty language granting Indians the "right of taking fish" does not contain any comparable specific language dealing with "charges," "incumbrances," "restrictions," or other type of limitations. Rather, that language merely grants a particular right. It is more analogous to broad treaty language granting the Indians exclusive use of reservation land,[19] or language in the General Allotment Act granting Indians' rights to allotted lands[20]—neither of which was even considered by the Court in *Squire* or subsequent cases. On its face, then, we believe the treaty language lacks the specificity and focus of the language at issue in *Squire*.

To be sure, the Supreme Court in considering the scope of the "right of taking fish" suggested that the only permissible limitations on that right are reasonable, nondiscriminatory regulations

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[19] See, e.g., Treaty of Olympia, July 1, 1855 and January 25, 1865, 12 Stat. 971 ("There shall . . . be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendant of Indian affairs or Indian agent.")

[20] See, e.g., 25 U.S.C. § 331 ("[T]he President shall be authorized . . . to cause allotment to each Indian"); id. § 334 (allotments to Indians not residing on reservations); id. § 336 (allotments to Indians making settlement on unappropriated lands).

designed to conserve the fish (and thereby preserve the fishing right). See, e.g., *Puyallup I,* 391 U.S. at 398; *Puyallup II,* 414 U.S. at 44, 45, 48. As noted above, however, the Court has not considered the question whether taxation of the income earned from the exercise of the fishing right is or is not contemplated by the treaty language. We believe that taxation of the income earned from the exercise of the treaty fishing right would have a qualitatively different effect on those rights than did the restrictions struck down by the Court in the treaty cases. The latter restrictions involved an actual limitation on the ability or opportunity of the Indians to take fish at the treaty locations—such as prohibitions on access, the use of physical devices that diminish or destroy the runs of fish available to the Indians, or license fees required as a prerequisite for exercise of fishing rights. See discussion supra. An income tax on the profits received from exercise of those fishing rights, while it may diminish the economic value of the right, does not interfere with the scope of the right itself—that is, to take a reasonable share of the available fish.

The taxation of profits earned from the exercise of treaty fishing rights will, of course, have an economic impact on Indians who earn that income. But the reduction of the economic value of a right guaranteed to the Indians has generally not been considered to be sufficient reason, standing alone, to create a tax exemption. See, e.g., *United States* v. *Anderson,* 625 F.2d at 914 n.6 ("*Capoeman* and every other Supreme Court and Ninth Circuit case have held that such policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption."); *Fry* v. *United States,* 557 F.2d at 649 ("[I]t is one thing to say that courts should construe treaties and statutes dealing with Indians liberally, and quite another to say that, based on those same policy considerations which prompted the canon of liberal construction, courts themselves are free to create favorable rules."). The fact that the right was created by language in a treaty does not provide an exception to the general rule favoring taxation, when that language merely establishes the existence of the right in broad terms. Otherwise, *Squire* v. *Capoeman* would be reduced to quite mechanical operation: i.e., if a right is granted to Indians by express language in a statute or treaty that benefits the Indians economically, income earned from exercise of that right is exempt from federal income taxation. We believe that conclusion is inconsistent with *Squire* v. *Capoeman,* as well as the conclusions in *Choteau* v. *Burnet* and *Superintendant of Five Civilized Tribes.*[21]

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[21] If *Squire* v. *Capoeman* were to be read that broadly, we would have difficulty developing a principled distinction between cases in which a right is granted by express language and cases in which a right is implied. For example, the statute at issue in *Karman* v. *Com'r,* the Reindeer Industry Act, arguably gave Indians an implied right to operate herds of reindeer for profit, subject to the supervision of the Secretary of Interior. Similarly, treaties between the United States and Indians in the western states have generally been interpreted to grant implied rights to use water that is minimally necessary to carry out the needs of the tribe, even if no water is expressly guaranteed by the treaties. It seems to us that, to the extent it is argued that the express grant of a right to Indians that has economic benefit carries with it a tax exemption, the argument should also apply to implied treaty rights. Clearly, however, that argument is inconsistent with the Court's analysis in *Squire* v. *Capoeman* and its repeated assertions that exemptions from taxation must be clearly and definitively expressed.

Additionally, in *Squire* the Court was able to point to a direct link between the tax exemption and the purpose of the statute, which was to grant individual Indians an unencumbered right to their allotted land, when they were judged ready to assume full responsibility for that land and the obligations flowing from ownership. During the period of trusteeship, that purpose could be thwarted by taxation of income received directly from use of the land, because a failure to pay that tax could result in a tax lien on the property. See *Squire* v. *Capoeman,* 351 U.S. at 10. Here, however, the link is much more tenuous, for it is difficult to argue that taxation of the net income derived from exercise of the fishing right would threaten the continued availability of that right. Accordingly, this situation is analogous to that described by the Court in *Karmun* v. *Com'r*:

> Moreover, as the Tax Court observed, the purpose of the legislation involved here [the Reindeer Industry Act] is entirely different from that in *Squire.* The purpose of the GAA was to benefit the individual allottees by preparing them to become independent citizens. Accordingly, the *Squire* court found that the tax exemption was crucial to fulfilling this purpose. *Squire,* 351 U.S. at 9. By contrast, the purpose of the Reindeer Act is to provide a continuing food source to the Eskimos of northwestern Alaska through the establishment of a native-operated reindeer industry. 25 U.S.C. § 500 (1982). That purpose is not undermined by requiring the owners and operators of the reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations.

749 F.2d at 570.

Nor do we find persuasive the further argument that because neither the Indians nor the United States contemplated, at the time the treaties were negotiated, that income derived from commercial fishing would be taxable, the rights reserved by the Indians include the right to be free from taxation. The argument, if taken to its logical extreme, would require that all income earned by Indians deriving from the exercise of a treaty or statutory right that predates the federal income tax be exempt from that tax. In *Choteau, Superintendant of Five Civilized Tribes,* and *Squire,* the Supreme Court implicitly rejected that argument, holding that Indians are not exempt from federal income taxation merely because of their status as Indians (i.e. as formerly sovereign people who had not been subject to the tax), but rather could claim an exemption only on the basis of specific treaty or statutory language indicating an intent to exempt. Finally, the argument, again if taken to its logical extreme, would mean that the courts could never take account of changes in conditions, laws, or regulations that postdate negotiation of the treaties—a view that would, we believe, stretch the canon of construction favoring interpretation of treaties as the Indians understood them beyond the scope intended by the Supreme Court. As the Court stated in *Kennedy* v. *Becker,* 241 U.S. 556, 563 (1916), "[i]t has frequently been said that treaties with the Indians should be construed in the sense which the Indians understood them. But it is idle to suppose that there was any anticipa-

tion at the time the treaty was made of the conditions now existing to which the legislation in question was addressed."

Finally, we do not believe the cases dealing with state taxation of Indians are relevant to the question of federal taxation. As discussed above, supra at 12, those cases rest on a preemption rationale that is not pertinent to interpretation of federal laws. See *Choteau* v. *Burnet,* 283 U.S. at 696 ("Royalties received by the government from mineral lease of Indian lands have been held beyond a State's taxing power on the ground that, while in the possession of the United States, they are a federal instrumentality, to be used to carry out a governmental purpose. It does not follow, however, that they cannot be subjected to a federal tax.").

III. CONCLUSION

For these reasons, we conclude that the position maintained by the IRS that income earned from exercise of treaty fishing rights is subject to the federal income tax is the sounder view of the law. We believe that position is fully consistent with the applicable Supreme Court precedents and is consonant with the trust relationship held by the United States with respect to Indian tribes.

ALLAN GERSON,
Deputy Assistant Attorney General.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, DC, March 12, 1985.

BIA.IA.0177

MEMORANDUM

To: Secretary.
From: Solicitor Frank K. Richardson.
Subject: Federal income taxation of Stevens treaty fishing income—Reponse to IRS opinion of November 23, 1983.

You have asked me to comment on the legal arguments made in an opinion of the Office of Chief Counsel, Internal Revenue Service, dated November 23, 1983. The IRS opinion was issued in response to Solicitor Coldiron's memorandum of September 21, 1983, which expressed his view that income earned by members of certain Washington State treaty tribes in the exercise of their treaty fishing right is not subject to federal income taxation. The Internal Revenue Service takes the position that such income in subject to federal income taxation.

I have already conveyed to you my reconfirmation of Solicitor Coldiron's 1983 opinion. In my view, the principal weakness of the IRS response to that opinion is its misapprehension of the Supreme Court's holding in *Squire* v. *Capoeman,* 351 U.S. 1 (1956). The IRS considers *Capoeman* to require and express exemption from federal tax. However, the General Allotment Act, which the Supreme Court construed in *Capoeman* to have created a tax exemption for income from the sale of timber on allotted land, did not contain such a tax exemption in explicit terms. The Court inferred an exemption from the government's undertaking, expressed in section 5

of the act, 25 U.S.C. § 348, to convey the allotment at the end of the trust period "free of all charge or incumbrance whatsoever" and a 1906 amendment to section 6 of the act, 25 U.S.C. § 349, which provides for removal of "all restrictions as to . . . taxation" after issuance of a fee patent. That language, construed in conjunction with the underlying purpose of the General Allotment Act, i.e., "to protect the Indians' interest and 'to prepare the Indians to take their place as independent, qualified members of the modern body politic' ", was sufficient, the Court held, to constitute the clear expression necessary to create a tax exemption. 351 U.S. at 6–9. See our 1983 opinion at 5–7.

The Internal Revenue Service takes the position that the policy underlying the Stevens treaties is not relevant to the determination of whether the treaties created a tax exemption. In so doing, the IRS ignores the practice established by the Supreme Court in *Capoeman* and followed consistently by the lower courts. That practice requires the identification of language in a treaty or statute which is arguably a tax exemption but then allows consideration of the underlying purpose of the enactment for the purpose of interpreting the arguable language to determine its tax exemption effect. The practice is discussed at some length in our 1983 opinion at pages 5–9. The proper role of policy in tax exemption analysis was succinctly described by the Ninth Circuit in *United States* v. *Anderson,* 625 F.2d 910 (9th Cir. 1980) cert. denied, 450 U.S. 920:

> *Capoeman* and every other Supreme Court and Ninth Circuit case have held that . . . policy arguments are fruitless in the absence of statutory or treaty language that arguably is an express tax exemption. Such policy arguments, however, might persuade courts to construe such arguable language, if any exists, actually to be an express tax exemption.

625 F.2d at 914, n.6. IRS quotes this statement from *Anderson* for the proposition that express exemptive language in a treaty a statute is required. IRS opinion at 6–7. It misses, however, the real thrust of the statement, which is that policy may indeed be examined to assist in the determination of whether arguable language is an express exemption.

In a recent decision, the Ninth Circuit demonstrated that it is still of the view that the purpose of a statute is relevant to the determination of whether a tax exemption is present. That court held in *Karmun* v. *Commissioner,* 749 F.2d 567 (9th Cir. 1984), that income from the sale of reindeer or reindeer products by Alaska natives was not exempt from federal income tax because the Reindeer Act, 25 U.S.C. §§ 500–500n, did not contain a clear expression of intent to exempt. The court considered, inter alia, the purpose of the Reindeer Act, which it found to be the provision of a continuing food source to the Eskimos of northwestern Alaska through the establishment of a native-operated reindeer industry. The court concluded, "That purpose is not undermined by requiring the owners and operators of the reindeer herds to pay federal income taxes on their profits from the successful conduct of such operations." 749 F.2d at 570.

Thus, it is amply clear that past and present judicial analysis requires a consideration of the underlying purpose of the Stevens treaties in order to determine whether the language in the treaties which secures a fishing right to the tribes creates a tax exemption. To conclude that the "right of taking fish" does not include a tax exemption, without any attempt whatsoever to determine the scope of the fishing right intended by the parties to the treaties, would directly contravene the well-established principles of the tax cases. Authoritative judicial analysis of the scope of the treaty right is readily available in the well-developed body of law culminating in the Supreme Court's decision in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n (Fishing Vessel),* 443 U.S. 658 (1979). In my view, there is neither a legal basis nor a practical justification for ignoring this body of law, as IRS does.[1]

The treaty cases and their relevance to the tax exemption issue are discussed in our 1983 opinion at 2–4 and 9–12. One case cited in that opinion warrants some further mention. In *Tulee* v. *Washington,* 315 U.S. 681 (1942), the Supreme Court held that the State of Washington was precluded from imposing a license fee upon Indians engaged in the exercise of their Stevens treaty fishing right. In striking down the fee, the Court stated that it "acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve" and "that such exaction of fees as a prerequisite to the enjoyment of fishing . . . cannot be reconciled with a fair construction of the treaty." 315 U.S. at 685.

Tulee involved a state license fee and not a federal tax. The rationale of that case, however, is relevant to any tax which would diminish the value of the treaty right because any such tax would necessarily be a "charge" for exercising the right. An income tax, in fact, might well be a more onerous burden on the right, because greater in amount, than a license fee would be. Further, the fact that an income tax does not fall directly upon the fishing activity but upon income therefrom is, under *Capoeman,* irrelevant if the treaty precludes taxation of the fishing right.[2] See 1983 Solicitor's opinion at 7.

Another concern I have with the IRS opinion is its heavy reliance on *Strom* v. *Commissioner,* 6 T.C. 621 (1946), aff'd per curiam, 158 F.2d 520 (9th Cir. 1947) and *Earl* v. *Commissioner,* 78 T.C. 1014 (1982). For the reasons discussed in our 1983 opinion at 12–15, I believe that *Strom* has been effectively eroded by subsequent case law and that *Earl* is seriously flawed. While these two Tax Court cases are clearly relevant to the present issue, they cannot be considered controlling because they are completely inadequate in treaty analysis.

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[1] IRS simply dismisses it: "The non-tax cases which are cited by Interior are, in our view, inapposite to the issue considered herein." IRS opinion at 10.

[2] The State of Washington recognizes that treaty fishermen are immune, even though not expressly exempted, from a state fish sales tax. See *Washington Dept. of Fisheries* v. *DeWatto Fish Co.,* 660 P.2d 298, 301 (Wash. Ct. App. 1983). Such a tax, of course is one which, like an income tax, would attach after exercise of the fishing right and would not therefore be a prerequisite to exercise of the right.

As explained in our 1983 opinion at page 4, the United States, absent exercise by Congress of its power to abrogate treaties, is subject to the same limitations as the states with regard to the Indians' treaty rights.

I can understand that, from the perspective of the IRS, this matter may appear to be solely a tax issue, with respect to which Tax Court decisions might be considered controlling and federal tax cases might constitute the sole appropriate body of law by which to analyze the issue. This is only a tax issue however; it is also an Indian treaty issue. There are two bodies of law which must be considered in relation to each other. The controlling cases here are not the two Tax Court cases but the two Supreme Court cases, *Capoeman* and *Fishing Vessel,* which represent the paramount authority in those two bodies of law. A proper analysis of the issue should begin with those cases and must relate the two bodies of law in proper perspective. This, IRS simply has not done.

I am somewhat concerned with some erroneous statements made in the IRS opinion about positions taken in our 1983 opinion. I point these out primarly for clarification purposes.

The IRS opinion states at page 6 that our 1983 opinion "argues that Interior Department's policies of promoting optimal land use on Treaty land with a goal towards eventual Indian economic independence precludes taxation of the fishing income earned by enrolled Tribal members." The 1983 opinion contains no such statement. Nor does it take the position, as the IRS opinion implies, that policy, standing alone, is a sufficient basis for a tax exemption. Our position on the proper role of policy is discussed above and at pages 5–9 of the 1983 opinion.

The IRS opinion states at pages 7–8 that "Interior's memorandum also places substantial reliance on the Ninth Circuit's statement in *Stevens* v. *Commissioner,* 452 F.2d 741, [746] ([9th] Cir. 1971), to the effect that as the agency charged with the administration of the Indian laws and responsible for drafting many of them, Interior's interpretation is entitled to 'great weight' and 'is not to be overturned unless clearly wrong.'" The IRS memo than proceeds at some length to construe the *Stevens* statement as applicable only to the facts at issue in that case. While our 1983 opinion cited the *Stevens* case for another proposition, it did not, in fact, cite or rely on the language quoted by IRS. That langauge, however, simply expresses a well-established general principle, and I find it somewhat puzzling that IRS considers it so alarming. This Department's authority to interpret federal Indian statutes and treaties derives from it paramount responsibility for Indain affairs within the federal government, just as the authority of the IRS to interpret the federal tax laws derives from its responsibility to administer those laws. Courts commonly look for guidance to federal agency interpretations of statutes within the jurisdiction of the agencies.

These last two points are minor ones, of course. My primary objections to the IRS opinion are, as discussed above, its incorrect analysis of *Squire* v. *Capoeman* and its failure to address the treaties which are at the heart of the issue under discussion.

FRANK K. RICHARDSON.

EXPLANATION OF MAJOR PROVISIONS

S. 727 as amended is intended to clarify that Indian treaties, and Executive orders and Acts of Congress under which the rights of

any Indian tribe to fish are secured, shall be construed to prohibit the imposition of any State or Federal tax on the income derived by a tribal member from the exercise of a secured right. It is the intent of the Committee that this legislation be read broadly to clarify the tax-exempt status of all fishing activities, regardless of whether they are protected by treaty, Executive order, or statute. Testimony before the Committee made it clear that the precise legal document which secured rights to Indians to fish often was an accident of history. Therefore, the exact nature of the document which secures the fishing rights, and its exact language, are not critical.

Many treaties, Executive orders, and Acts of Congress secure the exclusive rights to fish on-reservation and shared rights to fish off-reservation. In many instances, treaties secured the right to fish off-reservation at "all usual and accustomed grounds and stations." Pacific Northwest tribes are entitled to an opportunity to catch up to 50 percent not simply of the fish passing the traditional grounds, but also of those destined for those grounds but captured downstream or in marine waters. See *United States* v. *Washington,* 520 F. 2d at 689. In other words, a certain amount of escapement must be allowed for Indian fishermen to have an opportunity to catch their apportionment. Off-reservation fishing sites in the Northwest treaties are not necessarily limited to ceded territory, but the treaties confer no off-reservation fishing rights in areas other than usual and accustomed grounds. See *Seufert* v. *Olney,* 193 F. 200 (D. Wash. 1911). The Committee intends for S. 727 to apply to the income derived from harvesting fish acknowledged to be within that portion of the fish harvest allocated or classified as the "Indian" share under a treaty, Executive order, or Act of Congress.

The Committee intends for provisions in the legislation to be liberally construed. The term "rights to fish" includes the rights to fish for commercial as well as for subsistence purposes. It includes the harvest of all species of fish, shellfish, and other forms of marine life where rights to harvest such fish are secured. Fishing activities include assisting another Indian in a protected fishing activity when such activity takes place within the exterior boundaries of an Indian reservation or at usual and accustomed grounds and stations off-reservation. Such activities also include working as an employee of an Indian or Indian tribe when engaged in a secured fishing activity, including the processing and preparation of fish caught by other members of the same tribe.

The federal courts have interpreted reserved fishing rights to allow Indians to employ modern boats, nets, and other techniques, and to utilize improvements in traditional fishing techiques, methods, and gear. *United States* v. *Washington,* 384 F. Supp. at 402. See *Washington* v. *United States* v. *Fishing Vessel Ass'n,* 443 U.S. 658 (1979); See also *Puyallup Tribe* v. *Washington Dept. of Game,* 391 U.S. 392 (1968). Similarly, the Committee intends for S. 727 to clarify the tax-exempt status of income derived from the use of modern fishing equipment.

The term "Indian tribe" means any Indian tribe, band, nation or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The Committee in-

tends for the term "Indian tribe" to include any Alaska Native village which may possess fishing rights secured by treaty, Executive order, or Act of Congress.

The Federal courts consistently have held that fishing rights are tribal, not individual rights. See *United States* v. *Washington,* 520 F. 2d at 691; *Whitefoot* v. *United States,* 293 F. 2d 658, 661-63 (Ct. Claims 1961) cert. denied, 369 U.S. 818 (1962). Each tribe bargained as an entity for rights which were to be enjoyed communally. See *Sac and Fox Indians (Iowa)* v. *Sac and Fox Indians (Oklahoma),* 220 U.S. 481, 483-84 (1911). Individual Indians had no individual title to property, but participated in the communal rights of the tribe. "The right of the individual Indian is, in effect, a right of participation similar in some respects to the rights of a stockholder in the property of a corporation." F. Cohen, *Handbook of Federal Indian Law* (1942 ed.), quote in *United States* v. *Washington,* 520 F. 2d at 688.

The Committee intends for the provisions of S. 727 to apply to the fishing rights of any Indian tribe as a tribe, but the bill is intended to clarify the tax-exempt status of income derived by individual members of the tribe. The term "Indian" means a duly enrolled member of an Indian tribe or any corporation, partnership or other business entity that is 100 percent Indian-owned.

It is important to note that certain treaties, Executive orders, and Acts of Congress secure to tribes other rights such as hunting and gethering, and grazing on public lands. Furthermore, the Alaska National Interest Lands Act (ANILCA) also secures the rights of rural residents of Alaska, Indian and non-Indian alike, to hunt and fish for subsistence purposes. S. 727 does not address the status of income derived from the exercise of such rights since the Committee is unaware of any efforts to impute income from these activities or to impose tax liability on such activities. Furthermore, the Committee believes that the tax-exempt status of these activities and income derived thereform is clear, and that further legisation addressing the taxability of income derived from secured rights is unnecessary.

Finally, the Committee notes that a considerable body of law has evolved protecting Indian fishing activity from state and local regulation and taxation. S. 727 as amended is directly solely toward Federal and State taxation of income derived from fishing activities. Nothing in this Act, however, shall be construed as implying that any other form of taxation of Indian fishing, hunting, gathering, or grazing activities is sanctioned or approved.

Explanation of Committee Amendment

S. 727 as introduced was intended to clarify that Indian treaties and Executive Orders under which Indian tribes are recognized shall be construed to prohibit the imposition of a federal or state income tax derived by a tribal member from the exercise of fishing rights secured by such treaty or executive order. The substitute amendment provides that treaties and Executive orders need only secure tribal fishing rights, and that, unlike S. 727 as introduced, they need not of themselves provide for formal Federal recognition. Furthermore, the Committee amendment provides that Acts of

Congress under which fishing rights are secured, as well as treaties and Executive orders, shall be construed to prohibit the imposition of a Federal or state income tax on tribal fishing rights.

Legislative History

S. 727 was introduced on March 12, 1987, by Senator Evans, for himself and Senators Bradley, Inouye, DeConcini, Adams, and McCain. The bill was referred to the Select Committee on Indian Affairs for consideration. The Committee held a hearing on S. 727 on March 27, 1987, and ordered the bill reported to the full Senate on April 10, 1987. Senator Hatfield was added to the bill as a co-sponsor on May 5, 1987.

Committee Recommendation and Tabulation of Vote

The Select Committee on Indian Affairs, in open business session on April 10, 1987, by unanimous vote of a quorum present, adopted an amendment in the nature of a substitute and ordered the bill reported with a recommendation that S. 727 do pass as amended.

Section-by-Section Analysis

Section 1(a). This subsection amends Section 2079 of the Revised Statutes (25 U.S.C. 71). The amendment provides that Indian treaties, and Executive orders and Acts of Congress under which fishing rights are secured, shall be construed to prohibit the imposition of a federal or state income tax derived by a tribal member from the exercise of fishing rights secured by such treaty, Executive Order, or Act of Congress. The provision is intended to apply to both commercial and subsistence fishing.

Section 1(b). This subsection applies the provisions of this Act to any cases which are not already barred by the statute of limitations or any other bar to assessment of tax has not expired. The subsection is intended to clarify the retroactive nature of S. 727.

The title of S. 727 is amended to reflect the addition of the term "Acts of Congress" to the body of the legislation.

Cost and Budgetary Consideration

The cost estimate for S. 727, as amended, as provided by the Congressional Budget Office, is set forth below:

U.S. Congress,
Congress Budget Office,
Washington, DC, April 24, 1987.

Hon. Daniel Inouye,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 727, a bill clarifying the tax-exempt status of income derived from Indian fishing activities, as ordered reported from the Senate Select Committee on Indian Affairs on April 9, 1987.

The bill would exempt income derived from Indian fishing activities from federal and state taxation, when Indian fishing rights are secured by a treaty, executive order, or law.

CBO estimates that S. 727 will have an insignificant effect on federal budget revenues.

With best wishes,

Sincerely,

ROSEMARY MARCUSS,
(For Edward Gramlich, Acting Director.)

REGULATORY IMPACT STATEMENT

Paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 727, as amended, will have no regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee has received the following correspondence from the Department of the Interior and the Department of Justice:

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, April 24, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for our views on S. 727, a bill "To clarify Indian treaties and executive orders with respect to fishing rights."

We support enactment of S. 727 which would resolve an issue of great concern to Indian fishing tribes throughout the country, and which is an immediate concern on the Lummi Tribe and other Pacific Northwest fishing tribes: the taxation of income earned by tribal members exercising their fishing rights.

S. 727 would amend the provision codified in 25 U.S.C. 71 to provide that any treaties and executive orders under which any Indian tribe is recognized, shall be construed to prohibit the imposition under Federal or State law, of any tax on income derived by an Indian from the exercise of rights to fish secured by treaty or executive order, regardless of whether such rights are limited to subsistence or commercial fishing.

Recent opinions of the Solicitor, Department of the Interior, asserted that commitments made to Indian tribes preclude Federal taxation of income derived from the exercise of fishing rights. Last year, Secretary Hodel wrote to the Attorney General expressing the Department's concerns about such taxation, stating that the imposition of such a tax would represent an attack on the unique relationship existing between the United States and the tribes, and mark an abrupt departure from President Reagan's Indian Policy Statement of January 24, 1983. Correspondence to the Department of the Treasury also made clear the Interior Department's position on this issue.

As you know, the Internal Revenue Service is charged by the Congress with the responsibility of interpreting and applying the tax laws set forth in the Internal Revenue Code. It determined that

income derived personally by a restricted Indian in the exercise of fishing rights is taxable unless the applicable treaty contains language conferring an income tax exemption. The review of the positions of the Department of the Interior and Internal Revenue Servide (IRS) undertaken by the Department of Justice pursuant to Executive Order No. 12146 and 28 CFR 0.25, concluded that the Internal Revenue Service position is the sounder view of the law. The Department of Justice ruling maintains the IRS position that income earned from the exercise of Indian fishing rights is subject to Federal taxation. S. 727 would change applicable law to provide that the income derived from such Indian fishing would no longer be subject to Federal taxation.

Generations of American Indians have developed lifestyles, cultures, religious beliefs and customs around their relationships with fisheries resources. Historically, these resources provided food and tools, and were traded for a variety of goods. They continue to provide a base of sustenance, cultural enrichment and economic support for many tribes, and help maintain tribal social structure and stability by permitting gainful employment in traditional occupations.

At the time Indian treaties were signed, many tribes reserved to themselves the right to fish in perpetuity. Additionally, and as partial compensation for the land ceded by the tribes, the Federal Government has assumed a trust responsibility that guarantees Federal protection of Indian fishing rights. By the terms of their treaties the tribes shared a resource that they alone had previously used. It seems unfair to us to require them now to share, through the imposition of Federal taxes, the proceeds from the part of the fishery that it was agreed they would retain for themselves. The Indians who were parties to the treaties thought they would be able to continue to fish and trade fish as they had in the past, when they did not pay taxes, and were not required in any way to turn over a portion of their catch to the Government. Some courts have precluded states from taxing Indian fishing activities. I believe that the Congress should apply the same rule to the Federal Government.

It is the Department of the Interior's understanding that enactment of S. 727 would not result in a significant loss of Federal tax revenue. Data generated by the Lummi Tribe in a 1981 commercial fishing loan study reveals that, based on generous estimates, the potential tax revenue which could be derived from all Lummi tribal fishers, in an above average fishing year, would approximate $70,000. Since the Lummi Tribe harvests approximately one-half of the total Stevens Treaty tribal catch each year, the potential revenue which would be derived from taxing all income associated with the exercise of federally secured Indian fishing rights for all tribes would probably not exceed $120,000 annually. Additionally, small amounts of revenue would be derived from taxing the fishing related income of other tribes.

Lifting this tax burden will, at minimal cost to the Federal Government, contribute to the implementation of the President's policy in support of the development of Indian reservation economies. The President noted in his policy statement, which was announced on January 24, 1983, that tribal fishing resources provide an avenue of

development for many tribes. He initiated an effort to identify and remove Federal barriers to the development of tribal resources and to create a positive environment for the development and growth of reservation economies.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

ROSS O. SWIMMER,
Assistant Secretary, Indian Affairs.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, DC, April 9, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This provides additional information requested at the March 27 hearing on S. 727, a bill "To Clarify Indian Treaties and executive orders with respect to fishing rights." We were requested to provide the Committee with information regarding money spent by the Department of the Interior to defend members of Indian tribes in cases where the Internal Revenue Service has attempted to tax income earned by members of Indian Tribes exercising their treaty fishing rights. This also provides the information requested by Joe Mentor of your staff on April 2. The questions and answers are listed below:

1. "How much has the Department of the Interior spent in providing assistance to tribes?"

The Department of the Interior has provided the Lummi Tribe of Washington with $41,000 for attorney fees. Within the time available we have not developed estimates of the cost of staff time and related expenses that have been spent on this subject.

2. "Give an estimate of the actual cost in defending the Indian tribes."

Except as indicated in the answer to question 4. below, we do not have information on the costs in addition to those provided by us. However, the cost of defending tribes and tribal members exercising tribal rights in current and subsequent litigation depends upon a number of variables including the total number of tribes which would engage in litigation, the extent to which these tribes would work together and share information, and the extent to which the Departments of Interior, Justice and Treasury would be involved. At a minimum, it is anticipated that the treaty fishing tribes of Western Washington, the Columbia River, and the Great Lakes would initiate litigation, joined perhaps, by the Hoopa Valley Tribe, and by other tribes engaged in commercial fishing enterprises (e.g., the Red Lake and Leech Lake tribes of Minnesota). Many other tribes throughout the country may join in if they perceive the outcome of this litigation as possibly affecting income derived from other trust resources. Total costs for litigation support and attorney fees could run into the millions.

3. "Provide an estimate of how much of the cost will actually be collected."

The potential revenue which would be derived from taxing all treaty fishing income would probably not exceed $300,000 annually.

4. "How much money will the tribes have to spend?"

See response to Question 2. The tribes would have to pick up those litigation support and attorney fees costs not funded by the Federal Government.

It is our understanding that, to date, other Puget Sound tribes have spent $25,000 in attorney fees and that in two cases involving Michigan tribes, the Native American Rights Fund (NARF) has provided $13,110 in attorney fees.

5."How much are the Departments of Justice and the Treasury spending in prosecuting these cases?"

The Department of Justice has advised us that it has been involved in only one such case, involving what they describe as negligible costs and attorney fees.

We have been advised by the Seattle District Office of the Internal Revenue Service that it has spent on the Lummi cases alone, about $20,000 in staff time. This does not include related expenses.

We hope this information is helpful. If we can be of further assistance to you in this matter, please advise.

Sincerely,

ROSS O. SWIMMER,
Assistant Secretary, Indian Affairs.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, March 20, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your letter of March 18, 1987, requesting the views of the Department of Justice on S. 727, a bill to clarify Indian treaties and executive orders with respect to fishing rights. The legislation relates to the taxation of income derived by Indians from certain fishing rights. Your letter also invites us to present testimony regarding S. 727 at a hearing scheduled for March 27, 1987.

The Justice Department defers to the views of the Departments of Treasury and Interior concerning this legislation. Inasmuch as we have no position on the legislation, our appearance at the hearing to testify on S. 727 would not serve any useful purpose and, accordingly, we respectfully decline your invitation to testify.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law made by S. 727 (existing law proposed to be omitted is

enclosed in black brackets, new matter is printed in italic, existing law in which no changes are proposed is shown in roman):

FUTURE TREATIES WITH INDIAN TRIBES

(Sec. 207 of Rev. Statutes (25 U.S.C. 71))

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 1, 1871, shall be hereby invalidated or impaired[.] *: Provided, That such treaties, and any executive orders and Acts of Congress under which the rights of any Indian tribe to fish are secured, shall be construed to prohibit the imposition, under Federal law or under any law of a State or political subdivision thereof, of any tax on any income derived by an Indian from the exercise of rights to fish secured by such treaty, Executive order, or Act of Congress.*

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